

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

|                                  |   |                    |
|----------------------------------|---|--------------------|
| CYNTHIA K. MOORE,                | ) |                    |
|                                  | ) |                    |
| Plaintiff,                       | ) | Case No. 07-368-HO |
|                                  | ) |                    |
| v.                               | ) | ORDER              |
|                                  | ) |                    |
| Commissioner of Social Security, | ) |                    |
|                                  | ) |                    |
| Defendant.                       | ) |                    |
| _____                            | ) |                    |

Plaintiff brings this proceeding pursuant to section 205(g) of the Social Security Act (the Act), as amended, 42 U.S.C. § 405(g), to obtain judicial review of the Commissioner's final decision denying plaintiff's application for disability insurance benefits and supplemental security income.

Plaintiff filed this action on March 12, 2007. The Commissioner moves to dismiss contending that plaintiff failed to timely seek review of the Appeals Council's final decision. See 42

U.S.C. § 405(g) (civil action to be commenced within 60 days after the mailing of notice). Plaintiff did seek an extension from the Appeals Council and the Council denied the request.

Although plaintiff addresses the issue in her opening brief and contends that the Appeals Council erred by failing to find good cause to extend the filing date for a notice of appeal, the Commissioner failed to raise the issue in his answer to the complaint in this case filed on July 31, 2007. The Commissioner first raised the issue in his motion to dismiss filed on January 29, 2008.

The 60 day limit in section 405(g) is not jurisdictional, but instead constitutes a statute of limitations. Vernon v. Heckler, 811 F.2d 1274, 1277 (9<sup>th</sup> cir. 1987). A statute of limitations defense is an affirmative defense properly raised in a responsive pleading under Fed. R. Civ. P. Rule 8(c). A defendant's failure to raise an affirmative defense in his answer effects a waiver of that defense. Morrison v. Mahoney, 399 F.3d 1042, 1046 (9<sup>th</sup> Cir. 2005). Accordingly, defendant's motion to dismiss based on the statute of limitations issue is denied as defendant waived the defense by failing to raise it in the answer. Defendant is directed to file his memorandum on the merits of the case within 30 days. Plaintiff shall have 14 days thereafter to file a reply, if any.

CONCLUSION

The Commissioner's motion to dismiss (#24) is denied.

DATED this 6<sup>th</sup> day of August, 2008.

s/ S. Nogelmeier

UNITED STATES DISTRICT JUDGE